United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

77-7240

To be argued by
MILTON S. GOULD

B P/S

United States Court of Appeals
For The Second Circuit

UNITED STATES COURT OF APPEALS
FILED
JUN 1 1977
DANIEL FUSARO, CLERK
SECOND CIRCUIT

ROBERT PRATHER,

Plaintiff-Appellant,

against

AVIS, INC., RICHARD JOYCE SMITH, DRUMMOND C. BELL, RODNEY C. GOTT, ROBERT W. HAACK, WILLIAM W. LYON, ROBERT C. O'BRIEN, ELI SHAPIRO, OLCOTT D. SMITH, WILLIAM E. FRUHAN, JR., ALVA T. BONDA and JOHN J. SCANLON,

Defendants-Appellees.

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR PLAINTIFF-APPELLANT

RIBICOFF & KOTKIN
Attorneys for Plaintiff-Appellant
Robert Prather
799 Main Street
Hartford, Connecticut 06103
(203) 527-0781

Of Counsel
SHEA GOULD CLIMENKO & CASEY
330 Madison Avenue
New York, New York 10017
(212) 661-3200

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
THE ISSUES PRESENTED.....	1
STATEMENT OF THE CASE.....	1
POINT I - THE JURISDICTION OF THIS COURT ON THE INSTANT APPEAL IS PLENARY AND SHOULD BE EXERCISED IN VIEW OF CHANGED CIRCUMSTANCES WHICH COMPEL PRATHER TO MODIFY HIS REQUEST FOR RELIEF.....	5
POINT II - THE MISREPRESENTATIONS AND OMISSIONS OF THE PROXY STATEMENT ARE "MATERIAL" UNDER APPLICABLE LEGAL STANDARDS.....	11
POINT III - THE DEFECTS IN THE PROXY STATEMENT WERE NOT CURED BY THE UNTIMELY SUPPLEMENT THERETO.....	24
POINT IV - THE DISTRICT COURT ERRED SINCE PLAINTIFF HAD SATISFIED APPLICABLE STANDARDS GOVERNING ISSUANCE OF PRELIMINARY INJUNCTIVE RELIEF.....	31
POINT V - THE ANTICIPATED INVOCATION BY AVIS OF THE DOCTRINES OF LACHES AND UNCLEAN HANDS IS INAPPROPRIATE.....	39
CONCLUSION.....	41

TABLE OF AUTHORITIES

Cases: Page

Aerojet-General Corp. v. American Arbitration Association, 478 F.2d 248 (9th Cir. 1973)..... 8

Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972)..... 20

Allen v. Penn Cent. Co., 350 F. Supp. 697 (E. D. Pa. 1972)..... 26

Bersch v. Drexel Firestone, Inc., 519 F.2d 974, cert. den. 423 U.S. 1018 (1975)..... 8

Broder v. Dane, 384 F. Supp. 1312 (S.D.N.Y. 1974)..... 20

Capital Temporaries v. Olsten Corp., 506 F.2d 658 (2d Cir.1974)..... 8

Cauble v. White, 360 F. Supp. 1021 (E.D.La. 1973)..... 26

Chris-Craft Indus., Inc. v. Piper Aircraft Corp., 480 F.2d 341 (2d Cir. 1973), cert. den. 414 U.S. 910 (1973)..... 21

Clairdale Enterprises v. C.I. Realty Investors, 423 F. Supp. 261 (S.D.N.Y. 1976)..... 32

D-Z Investment Company v. Holloway, CCH Fed. Sec. L. Rep. ¶94,588 (S.D.N.Y. 1974)..... 32

Cohen v. Franchard Corp., 51 F.R.D. 167 (S.D.N.Y. 1970)..... 39

Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937 (2d Cir. 1969)..... 40

General Tire Corp. v. Talley Indus., Inc., 403 F.2d 159 (2d Cir. 1968), cert. den. 393 U.S. 1026 (1969)..... 26

TABLE OF AUTHORITIES

Cases:	Page
Gerstle v. Gamble-Skogmo, Inc., 478 F.2d 1281 (2d Cir. 1973)	26
Gordon v. Burr, 366 F. Supp. 156 (S.D.N.Y. 1973)	39
Gould v. American Hawaiian S.S. Co., 351 F. Supp. 853 (D. Del. 1972)	26
Hurwitz v. Director's Guild of America, Inc., 364 F.2d 67 (2d Cir. 1966), cert. den. 385 U.S. 971 (1966)	6, 32
Investors Management Co., Exchange Act Release No. 9267 (July 29, 1971)	23
Kohn v. American Metal Climax, Inc., 458 F.2d 255 (3d Cir. 1972), cert. den. 409 U.S. 874 (1972)	21, 22
McConnell v. Lucht, 320 F. Supp. 1162 (S.D.N.Y. 1970)	35
Mast, Foos & Co. v. Stover Manufacturing Co., 177 U.S. 485 (1900)	8
Mercury Motor Express, Inc. v. Brinke, 475 F.2d 1086 (5th Cir. 1973)	7
Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970)	20, 21, 31
National Grain Yeast Corp. v. City of Crystal Lake, 1470 F.2d 711 (7th Cir. 1945)	37
National Resources Defense Council, Inc. v. Morton, 458 F.2d 827 (D.C. Cir. 1972)	35
Noel v. Chapman, 508 F.2d 1023 (2d Cir. 1975)	7

TABLE OF AUTHORITIES

Cases: Page

Norte & Co. v. Huffines, 304 F. Supp. 1096 (S.D.N.Y. 1968), mod. 516 F.2d 1189 (2d Cir. 1969), cert. den. sub nom. Muscat v. Norte & Co., 397 U.S. 989 (1970)..... 22

Northeast Contruction Co. v. Romney, 485 F.2d 752 (D.C. Cir. 1973)..... 36

SEC v. Great Am. Indus., Inc., 407 F.2d 453 (2d Cir. 1968), cert. den. sub nom., Pagnini v. SEC, 395 U.S. 920 (1969), rev'g. 259 F. Supp. 99 (S.D.N.Y. 1966)..... 29

SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), cert. den. sub nom. Coate's v. SEC, 394 U.S. 476 (1969)..... 23

Sonesta Int'l Hotels v. Wellington Associates, 483 F.2d 247 (2d. Cir. 1973)..... 20, 26, 31, 34, 35

Texasgulf, Inc. v. Canada Development Corp., 366 F. Supp. 374 (S. D. Tex. 1973)..... 26

Treasure Valley Potato Bargaining Assoc. v. Ore-Ida Foods, Inc., 497 F.2d 203 (9th Cir.), cert. denied, 419 U.S. 999 (1974)..... 38

Tri-State Gen. & Transm. Ass'n. v. Public Serv. Com'n of Wyo., 412 F.2d 115 (10th Cir. 1969), cert. den. 397 U.S. 1043 (1970)..... 9, 32

TSC Industries, Inc. v. Northway, Inc., CCH Fed. Sec. L. Rep. ¶95,615 (1976)..... 20

United States v. International Telephone & Telegraph, et al. (Civil No. 13,320)..... 11

TABLE OF AUTHORITIES

Cases:	Page
U.S. Smelting Refining & Mining Co. v. Clevite Corp., CCH Fed. Sec. L. Rep. ¶92,691 (N.D. Ohio 1968)	27
Other:	
28 U.S.C. § 1291	1
28 U.S.C. § 2106	5
30 C.J.S. Equity § 99 (1965)	40
Jacobs, The Impact of Rule 10b-5, § 61.02(c) (1st ed. 1974)	35
9 Moore's Federal Practice ¶110.25[1]	6
The Wall Street Journal, "Avis Says Trustee to Sell Stock in Mid-77;" March 25, 1977	12

THE ISSUES PRESENTED

1. Is this Court warranted in exercising its plenary jurisdiction in view of the changed circumstances of this case (Point I, infra)?

2. Are the misrepresentations and omissions of the Proxy Statement material under applicable legal standards (Point II, infra)?

3. Were the defects in the Proxy Statement cured by the Supplement thereto (Point III, infra)?

4. Did the District Court err in applying standards governing issuance of preliminary injunctive relief (Point IV, infra)?

5. Are the doctrines of laches and unclean hands inapplicable in view of the factual context of this case (Point V, infra)?

STATEMENT OF THE CASE

This brief is submitted on behalf of plaintiff-appellant Robert Prather ("Prather"), who appeals pursuant to 28 U.S.C. §§ 1291 and 1291(a)(1) from each and

every part of an Order of The Honorable M. Joseph Blumenfeld of the United States District Court for the District of Connecticut (150a-173a), dated May 23, 1977, denying, inter alia, Prather's motion for the following preliminary injunctive relief:

> "(1) Enjoining defendant Richard Joyce Smith as Trustee pursuant to an Order of this Court dated January 6, 1975 (the 'Trustee') and defendant Avis, Inc. ('Avis') from (i) voting any shares of Avis common stock at the forthcoming annual meeting of Avis stockholders, and (ii) soliciting any proxies with respect thereto;
>
> "(2) Enjoining Avis from holding the forthcoming annual meeting of its stockholders scheduled to take place on May 25, 1977 until the material misrepresentations and omissions in the proxy statement for said meeting are corrected;
>
> "(3) Granting such other and further relief as to the Court may seem just and proper[.]"

On or about May 4, 1977, Avis mailed to its stockholders a Notice of Annual Meeting of Stockholders ("Notice") dated May 4, 1977, accompanied by a Proxy Statement dated May 4, 1977 (238a-269a). The Notice stated that the Annual Meeting would be held on May 25, 1977 for the following purposes:

"(1) To elect twelve (12) directors of the Company to hold office for terms of one to three years and until their respective successors shall have been elected and shall have qualified or, if Item (2) is not approved, until the next Annual Meeting of Stockholders and until their respective successors shall have been elected and shall have qualified;

"(2) To act upon a proposal to amend the By-laws of the Company to provide for the division of the Board of Directors into three classes, the terms of which expire at successive Annual Meetings of Stockholders, to provide that directors may be removed from office only for cause and to increase the number of directors required to constitute a quorum to a majority of the entire Board, and to amend the Certificate of Incorporation of the Company to require a special stockholder vote to amend the foregoing By-law provisions;

"(3) If the proposal described in Item (2) is approved, to act upon a proposal to amend the Certificate of Incorporation of the Company to require a special director or stockholder vote for certain mergers, consolidations and similar transactions under specified circumstances and for any alteration or repeal of such provisions;

"(4) To elect Arthur Andersen & Co. independent auditors of the Company for the year 1977; and

"(5) To consider and transact such other business as may properly come before the meeting or any adjournments thereof."

The gravamen of the Amended Complaint herein (3a-11a) is that the Proxy Statement was and is false and misleading in that it misrepresents and omits certain material facts (Point II, infra) as to which there is a substantial likeli-

hood that a reasonable stockholder of Avis would have considered important in deciding how to vote on the proposals which were submitted to the stockholders of Avis at the Annual Meeting.*

Since the District Judge permitted the Avis Annual Meeting to take place, the relief requested by Prather below is no longer apposite. On the basis of authorities hereinafter set forth (Point I, infra), it is respectfully submitted that this Court has jurisdiction to declare the vote on proposals (1), (2), and (3) a nullity--engendered, as it was, by defective solicitation materials (Point II, infra)--and to enjoin a proposed secondary offering of Avis stock which is inextricably related to the unlawful adoption of the foregoing proposals (infra, at 11).

* A separate class action alleging that the Proxy Statement was false and misleading, that the Trustee has perpetrated a fraud upon and has violated his fiduciary duty to the public stockholders of Avis, and asserting a derivative action on behalf of Avis (the "Miller action") has been commenced by an Avis stockholder having no connection with Fuqua.

POINT I

THE JURISDICTION OF THIS COURT ON THE INSTANT APPEAL IS PLENARY AND SHOULD BE EXERCISED IN VIEW OF CHANGED CIRCUMSTANCES WHICH COMPEL PRATHER TO MODIFY HIS REQUEST FOR RELIEF.

It is well-settled that the jurisdiction of this Court on the instant appeal is plenary. 28 U.S.C. § 2106 provides:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

Professor Moore states regarding this section:

> ". . . Once a timely appeal is taken from an order made appealable by statute, the power of a court of appeals should be plenary to the extent that it chooses to exercise it. A court should not close its eyes to what is plainly there. To read 28 USC § 2106 in a technical way is to defeat its purpose. The spirit of the decision of the Second Circuit in Hurwitz v. Directors Guild of America, Inc., deserves wide diffusion. In Hurwitz, an appeal was taken from an order denying a preliminary injunction. Persuaded by its study of the record that

> the plaintiffs were entitled to judgment on the admitted facts as a matter of law, the court of appeals reversed with instructions to grant a permanent injunction. To be sure, the circumstances were unusual, but the decision stands for the larger, very salutary proposition that once a case is lawfully before a court of appeals, it does not lack power to do what plainly ought to be done." (Emphasis added.)

9 Moore's Federal Practice ¶110.25 [1], p. 273 (footnote omitted). Thus, in the instant case on appeal, this Court "does not lack power to do what plainly ought to be done" - to declare the vote on proposals (1), (2), and (3) a nullity and to enjoin the proposed secondary offering refered to above and considered in detail infra at 11.

In the above quotation, Professor Moore cited the decision of Hurwitz v. Directors Guild of America, Inc., 364 F.2d 67 (2d Cir. 1966), cert. denied, 385 U.S. 971 (1966), in which this Court, considering an appeal from an order denying a preliminary injunction, granted judgment for plaintiffs in the form of a permanent injunction. In Hurwitz, a portion of plaintiffs' motion for a preliminary injunction was moot at the time of appeal in that it sought to interfere with union elections already held (Id. at 69). However, plaintiffs also sought a mandatory preliminary injunction compelling the union to admit them to membership pendente lite. This Court

found that plaintiffs were entitled to the relief sought pendente lite on the merits and permanently. In the interest of "economy in litigation" the Court directed that judgment on the merits be entered for plaintiffs.

In Noel v. Chapman, 508 F.2d 1023, 1024-25 (2d Cir. 1975), this Court stated:

> "Although technically the appeal here is from an order denying a preliminary injunction, the opinion of the court below finally determined the underlying legal and constitutional issues so that the case is ripe for plenary appellate review. Sound judicial administration requires us to avoid subsequent unnecessary proceedings in the district court."

In Mercury Motor Express, Inc. v. Brinke, 475 F.2d 1086, 1091 (5th Cir. 1973), the Fifth Circuit held that upon appeal from an order denying a preliminary injunction, it possessed plenary power in the action and could thus review an otherwise unreviewable stay order:

> "Because this case is properly before the court as an appeal from the denial of an injunction under 28 U.S.C.A. § 1292(a)(1), however, our permissible scope of review extends to the stay order as well. A court of appeals normally will not consider the merits of a case before it on an interlocutory appeal except to the extent necessary to decide narrowly the matter which supplies appellate jurisdiction, e.g., Time, Inc. v.

> Ragano, 5th Cir. 1970, 427 F.2d 219, but this rule is one of orderly judicial administration and not a limit on jurisdictional power. '[O]nce a case is lawfully before a court of appeals, it does not lack power to do what plainly ought to be done.' 9 Moore's Federal Practice ¶110.25[1] (2d ed. 1972)....
>
> "The Supreme Court has affirmed the power of an appellate court to reach the merits of a case before it on an interlocutory appeal and dismiss the action. Deckert v. Independence Shares Corporation, 1940, 311 U.S. 282, 61 S.Ct. 229, 85 L.Ed. 189; Smith v. Vulcan Iron Works, 1897, 165 U.S. 518, 17 S.Ct. 407, 41 L.Ed. 810. The Second Circuit exercised its broad jurisdictional power on an interlocutory appeal from denial of a preliminary injunction to direct the entry of judgment for the plaintiffs. Hurwitz v. Directors Guild of America, Inc., 2d Cir. 1966, 364 F.2d 67, cert. denied, 385 U.S. 971, 87 S.Ct. 508, 17 L.Ed.2d 435."

Accord Mast, Foos & Co. v. Stover Manufacturing Co., 177 U.S. 485, 494-495 (1900); Aerojet-General Corp. v. American Arbitration Association, 478 F.2d 248, 252 (9th Cir. 1973) ("This is an equity case, and it is well established that in such a case...an interlocutory appeal brings the entire case before the court."). See Bersch v. Drexel Firestone, Inc., 519 F. 2d 974, 994-995 (2d Cir. 1975), cert. denied, 423 U.S. 1018 (1975); Capital Temporaries Inc. v. Olsten Corp., 506 F. 2d 658, 660 (2d Cir. 1974).

Where it is apparent that changed circumstances are such that this Court now considers a case different from that presented to the District Court and one which requires a different result, this Court need not remand the case to the District Court for further consideration but may grant immediate injunctive relief. Tri-State Gen. & Transm. Ass'n v. Public Serv. Com'n of Wyo., 412 F. 2d 115 (10th Cir. 1969), cert. denied, 397 U.S. 1043 (1970). Since the District Judge permitted the Avis annual meeting to take place, the relief requested by Prather below [viz., that the meeting be enjoined or, alternatively, that Avis or any agent thereof be enjoined from tabulating and announcing the vote on proposals (1), (2), and (3)] is no longer apposite. It is, however, well within the jurisdiction of this Court, in accordance with the foregoing authorities, to declare the vote on proposals (1), (2), and (3) a nullity--engendered, as it was, on defective solicitation materials (Point II, infra)--and to enjoin the proposed secondary offering.

Finally, we note that the very relief requested herein would have been requested below had Avis disclosed the intended registration of the secondary offering in the

Proxy Statement.* Accordingly, and in view of their failure to disclose, neither Avis nor the Trustee can legitimately complain that the relief requested herein was not addressed to the District Judge below. To apply to the District Judge at this late date for an order enjoining the proposed secondary offering would be, in view of the tenor of the hearing below (70a-176a), a vain act which this Court would understandable abhor. Moreover, if Prather were to make such an application, he might very well be unable to return to this Court in time to enjoin the proposed offering.

* Point II, supra. The intent to register the proposed secondary offering in mid-June of 1977 was formed as early as March 24, 1977. Id.

POINT II

THE MISREPRESENTATIONS AND CMISSIONS OF THE PROXY STATEMENT ARE "MATERIAL" UNDER AP LICABLE LEGAL STANDARDS.

On May 17, 1977, Avis filed a registration statement covering a proposed secondary offering of 2,000,000 shares of its common stock with the Securities and Exchange Commission ("SEC"). The selling shareholder is to be the Trustee who holds, pursuant to an Order of this Court in United States v. International Telephone & Telegraph, et al. (Civil No. 13,320), approximately 47% of the outstanding shares of common stock of Avis ("Trust Property"). This proposed secondary offering will reduce to approximately 22% the percentage of Avis common stock held by the Trustee.

The Proxy Statement fails to disclose the intended registration of the proposed secondary offering. As the Proxy Statement is dated May 4, 1977, the omission of a reference to the proposed secondary offering was a willful attempt by defendants to conceal this material fact from the stockholders in soliciting proxies.

While logic alone mandates the inference that Avis and the Trustee had formed an intent to effect the proposed secondary offering prior to May 4, 1977 and that plans for the offering were underway prior thereto, Prather relies on far more than mere inference. The Court is respectfully re-

ferred in this regard to an article appearing on page "13" of the national edition of The Wall Street Journal, dated March 25, 1977, entitled, in relevant part, Avis Says Trustee to Sell Stock in Mid-'77; according to the first paragraph thereof:

> "Colin M. Marshall, president and chief executive officer of Avis Inc., met with a group of securities analysts at a midtown club yesterday morning, and told them the company's court-appointed trustee intends to go ahead with a public offering of Avis stock 'around the middle of this year.'"

In view of the foregoing, we respectfully submit that it was an affront to Prather, to the other stockholders of Avis, and to the Court below for Avis' counsel, at the preliminary injunction hearing in Hartford, Connecticut on May 23, 1977, to cavalierly dismiss the absence of any reference to the secondary offering in the Proxy Statement with the following "explanation":

> "Another terrible sin that we committed: on May 4th we did not reveal the fact that on May 16th we would file a registration statement."
>
> "Of course not. On May 4th we hadn't decided to file the registration statement. Sure, we were thinking about it, and that we told the world in the proxy material. That is to say we told them that the Trustee was bent on disposing of the stock in orderly fashion.
>
> "If we had said more than that, if we had predicted, prophesied, then we would really be in the ring." (129a; emphasis added.)

The materiality of the proposed secondary offering is obvious in view of the admitted relationship between the offering and the passage of the "anti-takeover" proposals referred to above. In a memorandum submitted on behalf of the Trustee to the District Court below, counsel for the Trustee stated (p. 18) that "[i]f the shareholders meeting is adjourned that [secondary] distribution would in all probability be suspended or delayed . . ." (emphasis added). At the preliminary injunction hearing, the Trustee's counsel offered the following reiteration:

> "Finally, any delay with respect to the acting upon the provisons that will be before the meeting on Wednesday and implementing those would probably cause the Trustee to be required to withdraw the registration statement now pending for the sale of two million shares." (147a; emphasis added.)

It is not difficult to surmise why the proposed secondary offering was not disclosed, since disclosure thereof would have necessitated further disclosure of the relationship between that offering and the passage of proposals (1), (2), and (3). Indeed, the very relationship between the secondary offering and the passage of the proposals is a further material fact which was not disclosed to the stockholders of Avis.

Assuming, arguendo, that the proposed secondary offering was so hastily organized that Avis did not know

or could not have known of its intended registration prior to May 4, 1977, an assumption which is belied by the foregoing article, the Proxy Statement should nonetheless have been updated sufficiently in advance of the meeting to inform the stockholders of the registration of the proposed secondary offering in order to make the statements therein not false and misleading.

The omission of a reference to the proposed secondary offering is material because the effect of proposals (1), (2), and (3) to be submitted to the stockholders (supra at 3), will be to perpetuate control of the Board of Directors and management of Avis by the Trustee for a period of at least two years. There is a substantial likelihood that a reasonable stockholder of Avis, in deciding how to vote on such proposals, would consider important the fact that a proposed secondary offering has been registered in which the Trustee would sell approximately one-half of the shares held by him.*

The Proxy Statement states that "[t]he Company has been advised by the Trustee that he currently intends to dispose of the remaining common stock of the Company held by him

* Moreover, we respectfully submit that it is exceedingly proper to infer that tender offer interest in Avis would increase as the Trustee reduces his controlling block of common stock. There is a substantial likelihood that a reasonable stockholder would consider this fact important as well in deciding how to vote on the aforesaid proposals.

... by means of additional public offerings from time to time." (Emphasis added.) In view of the registration of the proposed secondary offering and imminent sale by the Trustee of approximately one-half of his common stock, and the facts set forth in the article excerpted above, this statement is false and misleading. It is respectfully submitted that Judge Blumenfeld committed reversible error in finding that "the failure to disclose the intended registration of the secondary offer[ing]" in the Proxy Statement was not a material omission which rendered the statements therein materially misleading (158a, 162a).

On May 17, 1977, an offer to purchase the Trust Property was made by Fuqua Industries, Inc. ("Fuqua"). A letter dated May 16, 1977 from counsel to Fuqua directed to the Trustee stated that Fuqua intends to petition the District Court for an order permitting the Trustee to sell the Trust Property to Fuqua for cash at a price of $15.50 a share. Copies of this letter were directed to the other individual defendants. It is Fuqua's present intention, if permitted to purchase the Trust Property, promptly thereafter to propose a tax-free transaction to the remaining Avis stockholders at a price per share for their shares at least equivalent to the price per share paid for the Trust Property.

The Proxy Statement states with respect to proposals (2) and (3) of the Notice that:

> "...the proposed amendments of the Company's Certificate of Incorporation and By-laws are intended, in general, to make more difficult, and therefore discourage, attempts by others to acquire control of the Company, through acquisitions of stock or otherwise, in transactions not approved by the Company's Board of Directors. Neither the Company nor the Trustee is aware of any pending or proposed transaction that would be affected by the proposed amendments." (Emphasis added.)

The Proxy Statement should therefore have been updated sufficiently in advance of the meeting to inform the stockholders of Avis of the Fuqua offer in order to make the statements therein not false and misleading.

The Proxy Statement fails to disclose the interest of the Trustee and defendant O'Brien in discouraging offers to purchase the Trust Property.* The effect of the adoption of

---

* The Trustee and O'Brien are members of the law firm of Whitman & Ransom, which is counsel to the Trustee. Said firm has received substantial fees for such representation. The fact of Whitman & Ransom's representation of the Trustee and the amount of its fees are material in order that the stockholders of Avis may properly evaluate the interest of the Trustee, O'Brien, and the other directors in discouraging offers by third parties to purchase the Trust Property and thereby deprive Whitman & Ransom of its role as counsel to the Trustee. A subsequent untimely Supplement to the Proxy Statement (Point III, infra) disclosed that Whitman & Ransom has received fees in the amount of $220,000 for its representation of the Trustee and that the Trustee, since the time of his appointment, has received $100,000 in fees.

proposals (2) and (3) of the Notice will be to discourage offers by third parties to purchase the Trust Property since, if the adoption of such proposals is not declared a nullity, any purchaser will be unable to assert management control over Avis for a substantial period of time. Thus, in the letter to the Trustee dated May 16, 1977, referred to above, Fuqua stated that should proposals (2) and (3) be adopted, Fuqua would not be interested in purchasing the Trust Property.

The compensation received by the Trustee is not disclosed in the Proxy Statement. The amount of such compensation is material in order that the stockholders may properly evaluate the interest of the Trustee and the directors in discouraging offers by third parties to purchase the Trust Property.

With respect to proposals (2) and (3), the Proxy Statement states:

> "The Board of Directors believes that, with the Board consisting at present almost entirely of persons who are not officers or employees of the Company, it is unlikely that the amendments would result in perpetuation of the Company's present officers under circumstances detrimental to the stockholders, although stockholders should consider that the Board's determination with respect to takeover bids might be influenced by directors' self-interest in remaining directors of the Company.

> "The Board of Directors has concluded that the potential benefits of the proposed amendments outweigh any possible disadvantages thereof and the Board of Directors unanimously recommends approval of the proposals described below."

The Proxy Statement, however, does not disclose that the Trustee, as holder of 47% of the common stock of Avis, effectively controls the Board of Directors. As is more fully set forth above, one effect of the adoption of proposals (2) and (3) of the Notice is to discourage offers to purchase the Trust Property, thereby ensconcing defendant Richard Joyce Smith and Whitman & Ransom in their roles as Trustee and counsel to the Trustee, respectively. Said omission renders the above quoted statement materially false and misleading.

With respect to proposals (2) and (3) of the Notice, the Proxy Statement further states that "[t]hese proposals could deter a change in the management or control of the Company that would be advantageous to the Company and its stockholders." In fact, changes in management and in particular Fuqua's offer to purchase the Trust Property will be deterred by adoption of proposals (2) and (3). The above quoted statement is therefore false and misleading.

The Proxy Statement further states with respect to proposals (2) and (3) of the Notice that "[t]ender offers or other acquisitions of stock for the purpose of acquiring control of the Board of Directors could be discouraged...." In fact, tender offers or other acquisitions and in particular Fuqua's offer to purchase the Trust Property will be discouraged by adoption of proposals (2) and (3). The above quoted statement is therefore false and misleading.

With respect to proposal (3) of the Notice, the Proxy Statement states that "[t]he effect of the proposed amendments described above could be to discourage a tender offer or takeover bid by a corporation, person or entity intending to acquire control of the Company through the acquisition of a substantial number of shares of the Company's stock....The proposed amendment would make it more difficult to effect such a transaction and might therefore discourage an attempt to do so." In fact, tender offers or takeover bids and in particular Fuqua's offer to purchase the Trust Property will be discouraged by adoption of proposal (3). The above quoted statement is therefore false and misleading.

Rule 14-9, promulgated under § 14(a) of the Securities Exchange Act of 1934, provides that no proxy solicitation shall be made "which ... is false or misleading with respect to any

material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading." The Supreme Court of the United States most recently set forth the general standard of materiality best comporting with Rule 14a-9's policies in TSC Industries, Inc. v. Northway, Inc., CCH Fed. Sec. L. Rep. ¶ 95,615, at 90,069, 90,070 (1976):

> "[A]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. This standard is fully consistent with Mills' general description of materiality as a requirement that 'the defect have a significant propensity to affect the voting process.' It does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote. What the standard does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." (Emphasis in original.)

Accord, Sonesta Int'l Hotels v. Wellington Associates, 483 F. 2d 247 (2d Cir. 1973). See also Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970); Broder v. Dane, 384 F. Supp. 1312 (S.D.N.Y. 1974).

It is respectfully submitted that there is a substantial likelihood that the non-disclosures in the Proxy Statement referred to above would have been considered important by a reasonable shareholder in deciding how to vote.

Among other things, and as set forth above, the Proxy Statement did not disclose the financial interest of the Trustee and defendant O'Brien in discouraging offers by third parties to purchase the Trust Property (supra at 16). These facts should have been included in the Proxy Statement to constitute full disclosure to the Avis stockholders. See, e.g., Chris-Craft Indus., Inc. v. Piper Aircraft Corp., 480 F. 2d 341, 365-66 (2d Cir. 1973), cert. denied, 414 U.S. 910 (1973). Accord, Mills v. Electric Auto-Lite Co., supra, 396 U.S. 375, 384 n. 6; Kohn v. American Metal Climax, Inc., 458 F. 2d 255, 267 (3d Cir. 1972), cert. denied, 409 U.S. 874 (1972). Although Judge Blumenfeld acknowledged that the Trustee and O'Brien were in a conflict situation (164a, 166a) because of their financial interest, the Court found the conflict or interest to have been adequately disclosed since "the amount of those fees are public, they have been approved by Justice, ITT and by me." (165a) That the compensation received by both the Trustee and Whitman & Ransom may be on file with the Court below does not, however, constitute adequate disclosure for purposes of Avis' solicitation of

proxies.* In support of this proposition, one need only note the various cases which have condemned different manifestations of the buried facts doctrine: disclosing important data only in appendixes to a lengthy document (Kohn v. American Metal Climax, Inc., 458 F.2d 255, 267-68 (3rd Cir.), cert. denied, 409 U.S. 874 (1972)), even though a cross-reference to the appendixes appears in the body of the material; and placing facts where one is not apt to see them as, for example, at the end of a section or under an inappropriate heading (Norte & Co. v. Huffines, 304 F. Supp. 1096, 1106 (S.D.N.Y. 1968), mdf'd, 416 F.2d 1189 (2d Cir. 1969), cert. denied sub nom. Muscat v. Norte & Co., 397 U.S. 989 (1970)). Of what use or benefit is it to one reading the Proxy Statement that the foregoing material information is "on file" with the District Court? Avis does not even contend that the stockholders were apprised of that fact, although a mere "cross-reference" to the Court's files would also have been

---

* It is hoped that we have come sufficiently far in terms of disclosure so that the following attempt by Avis' counsel to cavalierly excuse this defect of the solicitation materials will no longer be countenanced:

> "And finally there is the terrible sin involved in failing to proclaim to the world that the Trustee gets paid for his work, and so do his lawyers. Well, if those were facts utterly unknown to the shareholder public, then the shareholder public believes in free lunch." (130a)

patently insufficient disclosure.* Information becomes public only if it is "disseminated in a manner making it available to investors generally." Investors Management Co., Exchange Act Release No. 9267, at 10 (July 29, 1971). Accord, SEC v. Texas Gulf Sulphur Co., 401 F. 2d 833, 848-49, 854 (2d Cir. 1968), cert. denied sub nom. Coates v. SEC, 394 U.S. 976 (1969).

* Also patently insufficient in terms of disclosure to Avis' stockholders are the following "findings" upon which the District Judge placed reliance at the hearing below:

> "And actually in his Trustee's report dated April 20th and filed with this Court, which is a matter of public record, Mr. Smith indicated what the proposed amendments were that were going to be presented to the shareholders for action.
>
> "Also not disclosed today in that connection is the fact that these proposed amendments came about as a result of a study in some depth by an ad hoc committee of the Board of Directors. I forget who they are." (163a)

POINT III

THE DEFECTS IN THE PROXY STATEMENT WERE NOT CURED BY THE UNTIMELY SUPPLEMENT THERETO

On May 19, 1977, six days prior to the annual meeting, Avis mailed to its stockholders of record an allegedly "corrective" statement or Supplement (48a) to the Proxy Statement of May 4, 1977. It is, however, respectfully submitted that the issuance of the Supplement is evidence that the initial Proxy Statement was misleading, particularly as to the many misrepresentations and omissions discussed in Point II, supra, which were not in any way caused by the intervening offer of Fuqua. Since all stockholders of Avis were entitled to full and fair disclosure sufficiently in advance of the annual meeting of May 25, 1977 in order to evaluate and act upon such disclosure, the Supplement of May 19, 1977 was obviously deficient. It is also apparent that the "corrective" statement could not have reached the large number of stockholders holding stock in street name prior to the annual meeting. As to those stockholders who did receive the Supplement, there was little that could be done save hastily making last minute reservations to appear in person at the meeting in order to revoke proxies already given to management. Thus, the supplement is a "corrective" statement in only the most formalistic

sense, incapable of reaching stockholders in time for them to evaluate and thereafter act upon the information contained therein. No Avis stockholder could conceivably receive the Supplement and revoke his or her proxy by mail in the period between the alleged mailing (dated May 19) and the date of the annual meeting (May 25).

Although Avis will undoubtedly congratulate itself on its alleged alacrity in obtaining accelerated SEC clearance of the Supplement and its allegedly prompt transmittal of the Supplement to stockholders, most of the misrepresentations and omissions contained in the Proxy Statement relate to facts of which the defendants were aware well prior to the issuance thereof. In this category are the registration of the proposed secondary offering by the Trustee (amended complaint) ["am. comp."] pars. 10-15), the failure to disclose the interest of the Trustee and defendant O'Brien in discouraging offers to purchase the Trust Property (am. comp. par 22), and the fact that the proposals submitted at the annual meeting will in fact deter changes in management and control of the company (am. comp. pars. 23-25). Having withheld material information until the eve of the scheduled meeting without any justification whatsoever, defendants should not now be permitted to claim that the initial misleading Proxy Statement has been "cured" by the belated Supplement.

It is well-settled that a proxy statement should be updated where there is a material change of facts. See, e.g., General Time Corp. v. Talley Indus., Inc., 403 F. 2d 159, 163 (2d Cir. 1968), cert. denied, 393 U.S. 1026 (1969). Accord, Gerstle v. Gamble-Skogmo, Inc., 478 F. 2d 1281, 1297 n. 15 (2d Cir. 1973); Allen v. Penn Cent. Co., 350 F. Supp. 697, 705 (E.D. Pa. 1972); Gould v. American Hawaiian S.S. Co., 351 F. Supp. 853, 868 (D. Del. 1972). In relying upon the issuance of the foregoing Supplement, Avis overlooks the equally well-settled fact that correction of proxy or tender offer material can be considered effective only when stockholders have been given a reasonable time to evaluate the corrective material. In Cauble v. White, 360 F. Supp. 1021, 1030 (E.D. La. 1973), the Court ordered that shareholders who had tendered shares pursuant to a misleading tender offer should be given seven days to withdraw the shares subsequent to publication of a corrected offer. Similarly, in Sonesta International Hotels Corp. v. Wellington Associates, 483 F. 2d 247, 255 (2d Cir. 1973), the Court in requiring supplemental disclosure in a tender offer required that the offeror "offer[ ] to those tendering shareholders who responded to its current offer an opportunity within a reasonable period of time to rescind their tender." Accord, Texasgulf, Inc. v. Canada Development Corp., 366 F. Supp. 374, 379 (S.D. Tex. 1973).

In U.S. Smelting Refining & Mining Co. v. Clevite Corp., CCH Fed. Sec. L. Rep. ¶ 92,691, at 99,053, 99,054 (N.D. Ohio 1968), the Court analyzed the argument of Clevite that, even if it were required to disclose a certain offer in its May 6 proxy materials, its failure to do so was cured by a discussion contained in proxy materials of June 11. "This argument," noted the Court, "ignores many of the realities of the situation. Some of these realities are:"

> "(1) That for over one month the Clevite management has been actively soliciting proxies pursuant to the defective May 6 materials.
>
> * * *
>
> "(3) That shareholders are being called upon to decide how they will vote in an atmosphere of great confusion; that is, after numerous mailings, telephone calls, adjournments of meetings, and wide newspaper reporting of the charges and countercharges which have been made in this action.
>
> "(4) That, with the meeting set for June 21, the shareholders will have at most [emphasis in original] nine days within which to evaluate the June 11 materials, and in the case of large numbers of shareholders holding shares in a street name, far less or no opportunity to evaluate such materials.
>
> * * *

"(6) That, while Clevite urges that its shareholders have the opportunity and right in the next few days to revoke the proxies which have ben [sic] executed over a period of the last month, the portion of the June 11 proxy materials which purports to explain this right is at best rather vague, to wit:

"'If you have previously sent us your proxy voting in favor of the TRW merger and do not care to change your vote, you need not return the enclosed proxy.

"'If you have not previously sent us a proxy, use the enclosed proxy to vote FOR the TRW merger and thus support us in our considered judgment that prompt completion of the TRW merger is in the best interests of Clevite shareholders as a whole.'

"Even if the right to revoke was clearly stated and explained, it seems entirely inappropriate for a Court to allow the voting of proxies received from a defective solicitation." (Emphasis added, except where otherwise indicated.)

The Court concluded that under the circumstances discussed above, "fair corporate suffrage" could not and would not be served if those proxies then solicited by Clevite management were found to be valid. An order was accordingly entered voiding all proxies received by way of solicitation undertaken by Clevite management and, further, requiring that the shareholders' meeting set for June 21 be postponed until such time as a new solicitation of proxies could be undertaken.

Cf. SEC v. Great Am. Indus., Inc., 407 F. 2d 453, 457 (2d Cir. 1968), cert. denied sub nom., Pagnini v. SEC, 395 U.S. 920 (1969), rev'g 259 F. Supp. 99, 107 (S.D.N.Y. 1966): "While inadvertence and prompt correction after complaint are mitigating circumstances and may affect liability for damages, they do not defeat the SEC's right to injunctive relief."*

As set forth above, most of the misrepresentations and omissions contained in the Proxy Statement relate to facts of which the defendants were aware well prior to the issuance thereof (supra, at 25). Accordingly, the Supplement was an exceedingly improper communication as a matter of fact, as well as untimely as a matter of law. The Supplement is also insufficient as to the Fuqua offer which was promptly made after Fuqua learned in mid-May of the misrepresentations and omissions of the Proxy Statement and prior to the annual meeting of Avis' stockholders. It is respectfully submitted that the Court, in accordance with the foregoing authorities, should not stamp its imprimatur upon a Supplement which was incapable of reaching

* We note that the Supplement--like the initial Proxy Statement it was intended to correct--fails to disclose to the stockholders of Avis the admitted relationship between the anti-takeover proposals and the proposed secondary offering (supra, at 13).

stockholders in time for them to evaluate and thereafter act upon the information contained therein. The test is not, as the District Judge below suggested, "prompt and expeditious" issuance of the Supplement no matter how close in time to the annual meeting (162a). Full and fair disclosure sufficiently in advance of the meeting--not corporate expediency--is the test which should have been employed pursuant to the applicable authorities referred to above.

POINT IV

THE DISTRICT COURT ERRED SINCE PLAINTIFF HAD SATISFIED APPLICABLE STANDARDS GOVERNING ISSUANCE OF PRELIMINARY INJUNCTIVE RELIEF.

It is well-settled that a preliminary injunction should issue only upon a clear showing of either (1) probable success on the merits and possible irreparable injury, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief. See, e.g., Sonesta Int'l Hotels Corp. v. Wellington Asssociates, 483 F. 2d 247, 250 (2d Cir. 1973). As the Supreme Court noted in Mills v. Electric Auto-Lite Co., supra, 396 U.S. 375, 383 (1970), in dealing with § 14(a) and Rule 14a-9, "[u]se of a solicitation that is materially misleading is itself a violation of law, as the Court of Appeals recognized in stating that injunctive relief would be available to remedy such a defect if sought prior to the stockholders' meeting."

The probability of success on the merits in any application for injunctive relief turns greatly upon whether the plaintiff has shown that the proxy statement under attack has misstated or omitted material facts. Cf. Sonesta

Int'l Hotels Corp. v. Wellington Associates, supra. The materiality of facts allegedly misstated or omitted depends, in turn, upon whether a reasonable investor might have considered them to be important in deciding how to vote (Point II, supra). It is respectfully submitted that Prather had established below a probability of success on the merits with respect to the issue of material non-disclosure and had, at the very least, raised sufficiently serious questions going to the merits to make them a fair ground for litigation.

It is apparent that Prather will suffer irreparable injury if the Court does not (i) declare the May 25, 1977 vote by the stockholders of Avis on proposals (1), (2), and (3) a nullity - engendered, as it was, by the defective solicitation materials referred to above - and (ii) enjoin the proposed secondary offering of Avis stock.*

* There is ample precedent for the relief requested herein. See, e.g., Clairdale Enterprises v. C.I. Realty Invetors, 423 F. Supp. 261 (S.D.N.Y. 1976), to the effect that the results of an annual meeting may be set aside, the proxies resolicited and a new vote held upon a demonstration that the proxies were unlawfully obtained. Accord, D-Z Investment Company v. Holloway, CCH Fed. Sec. L. Rep. ¶94,588 (S.D.N.Y. 1974). Cf. Hurwitz v. Directors Guild of America, Inc. 364 F. 2d 67 (2d Cir. 1966) (supra at 6), with respect to Prather's request that the proposed secondary offering be enjoined. See also, Tri-State Gen. & Transm. Ass'n v. Public Serv. Com'n of Wyo. 412 F. 2d 115 (10th Cir. 1969), cert. denied, 397 U.S. 1043 (1970) (supra at 9).

As is more fully set forth above, an offer to purchase the Trust Property was made by Fuqua on May 17, 1977. A letter dated May 16, 1977 from counsel to Fuqua directed to the Trustee stated that Fuqua intends to petition the District Court for an order permitting the Trustee to sell the Trust Property to Fuqua for cash at a price of $15.50 a share. Copies of this letter were directed to the other individual defendants. It is Fuqua's present intention, if permitted to purchase the Trust Property, promptly thereafter to propose a tax-free transaction to the remaining Avis stockholders at a price per share for their shares at least equivalent to the price per share paid for the Trust Property. The effect of the adoption of proposals (2) and (3) of the Notice (supra at 3) is to discourage offers by third parties to purchase the Trust Property since these proposals, as adopted, preclude any purchaser from asserting management control over Avis for a substantial period of time. Thus, in the letter to the Trustee dated May 16, 1977, referred to above, Fuqua stated that should proposals (2) and (3) be adopted, Fuqua would not be interested in purchasing the Trust Property. Accordingly, those stockholders of Avis who wish to receive $15.50 for each share of their Avis common stock will suffer possible irreparable injury if the vote on proposals (1), (2), and (3) is not declared a nullity and if

the proposed secondary offering is not enjoined. The facts referred to above offer a classic picture of a presently existing actual threat as opposed to one of possible remote future injury.

The alternative branch of the standard governing issuance of preliminary injunctive relief was similarly satisfied since, in addition to raising sufficiently serious questions going to the merits to make them a fair ground for litigation, Prather had also established below a balance of hardships tipping decidedly in his favor. One need only compare the possibility of irreparable injury analyzed above with the obvious proposition that preliminary relief -- in assuring that the Proxy Statement would have contained full and fair disclosures -- would not have sacrificed the legitimate desires of any Avis stockholders. If the position of Avis were subsequently upheld, the solicitation could have been renewed. Where it appears likely that a Proxy Statement may contain materially misleading statements or omissions as made, the interest of the stockholders and of the public in full disclosure of relevant circumstances renders preliminary injunctive relief an appropriate method of remedying the deficiencies in disclosure before the stockholders' meeting takes place. Cf. Sonesta Int'l Hotels Corp. v. Wellington Associates, supra, at 250, 251.

As set forth above, the probability of success on the merits in any application for injunctive relief turns greatly upon whether the plaintiff has shown that the Proxy Statement under attack has misstated or omitted material facts. Cf. Sonesta Int'l Hotels Corp. v. Wellington Associates, supra. Plaintiff respectfully submits that such a showing had in fact been made upon all the papers and proceedings heretofore had and filed below. Indeed, issuance of the allegedly "corrective" Supplement referred to above is, as to the many misrepresentations and omissions which were not in any way caused by the intervening Fuqua offer, subjective evidence of materiality. Jacobs, The Impact of Rule 10b-5, § 61.02[c], at 3-88 (1st ed. 1974).

It is anticipated that Avis will again invoke authorities such as McConnell v. Lucht, 320 F. Supp. 1162 (S.D.N.Y. 1970), in which a stockholder was not permitted to enjoin an impending annual meeting. Such authorities are factually inapposite, since they are premised on an inexcusable lack of diligence which is conspicuously absent in the instant action (Point V, infra).

The opinion of the District of Columbia Circuit in National Resources Defense Council, Inc. v. Morton, 458 F. 2d 827 (D.C. Cir. 1972), should be noted with respect to the

standard of review to be applied to the denial of Prather's motion for a preliminary injunction. The Court in that case considered a motion for summary reversal of the grant of a preliminary injunction by the District Court. With regard to the standard of review, the Court stated:

> "However, a greater amplitude of judicial review is called for when the appeal presents a substantial issue that the action of the trial judge was based on a premise as to the pertinent rule of law that was erroneous. Not only the avowed forecast as to probability of success on the merits, but also the analysis of injury to either or both parties, the public interest, and the balancing of interests may well come to depend on an assumption of underlying legal premise. When this can be identified, the appellate court furthers the interest of justice by providing a ruling on the merits to the extent that the matter is ripe, though technically the case is only at the stage of application for preliminary injunction. And a reversal based on a disagreement with the underlying legal premise of the trial court is not based on, or to be construed as, a determination of arbitrary abuse of judicial discretion." Id. at 832 (footnotes omitted).

Accord, Northeast Construction Co. v. Romney, 485 F. 2d 752, 756 (D.C. Cir. 1973).

Further, this Court's scope of review is greater where, as here, the District Court denied Prather's motion

without hearing oral evidence. The District Court's decision was based solely on the affidavits which are in the record before this Court (32a, 37a, 44a) and oral arguments by counsel. This Court is therefore in the same position as was the District Court. National Grain Yeast Corp. v. City of Crystal Lake, 147 F. 2d 711, 713 (7th Cir. 1945).

Applying these principles, it is submitted that the denial by the District Court of Prather's motion for a preliminary injunction was error which this Court may correct.

Whether Fuqua could, after the Trust Property is partially dispersed, obtain 47% of the common stock of Avis is uncertain. Further, even if Fuqua were able to obtain 47% of the common stock of Avis, it would be unable as a practical matter to obtain management control of Avis in view of the lock-in Proposals adopted at the annual meeting. Realistically, even if Fuqua were to obtain a control position in Avis stock at a later date, the outside directors would not resign or agree to a merger between Fuqua and Avis. The tendency of incumbent management, no matter how disinterested they purport to be, is to assume they can provide management superior to any outside group. Without the acquiescence of the board of directors, the only alternative method of ob-

taining management control of Avis, in view of the adoption of the foregoing Proposals at the annual meeting, is to obtain an 80% vote of all outstanding shares. Again, as a practical matter, such a vote would be virtually impossible to obtain. Even with the Trustee voting 47% of the Avis common stock in favor of the Proposals at the annual meeting, the highest percentage affirmative vote obtained was 72% of the shares eligible to vote.

Thus, should the proposed secondary offering go forward, Prather and the other stockholders of Avis will lose the benefit of the Fuqua offer and any other offers that might be made. Since the amount that would be received by Avis stockholders from possible future offers is not ascertainable, the damages to the stockholders are likewise not ascertainable and Prather is therefore entitled to injunctive relief. See, e.g., Treasure Valley Potato Bargaining Assoc. v. Ore-Ida Foods, Inc., 497 F. 2d 203, 218 (9th Cir.), cert. denied, 419 U.S. 999 (1974).

POINT V

THE ANTICIPATED INVOCATION BY AVIS OF THE DOCTRINES OF LACHES AND UNCLEAN HANDS IS INAPPROPRIATE.

Although the Avis Proxy Statement is dated May 4, 1977, Prather did not receive a copy thereof until May 12, 1977. Following receipt of the Proxy Statement and discovery of the foregoing material misrepresentations and omissions, Prather promptly caused his attorneys to prepare the necessary papers and initiated the action below by presentation of an Order To Show Cause to the District Court on May 18, 1977. There was thus no delay in bringing the serious misrepresentations and omissions which are the subject of this action to the attention of the District Court.

The threshold element of the affirmative defense of laches is a lack of diligence by the party against whom the defense is asserted. See, e.g., Gordon v. Burr, 366 F. Supp. 156, 171 (S.D.N.Y. 1973) (lack of diligence and resulting prejudice); Cohen v. Franchard Corp., 51 F.R.D. 167, 173 (S.D. N.Y. 1970) (inexcusable delay and prejudice therefrom). Avis is unable to establish a lack of diligence on Prather's part. Obviously, since the period for measuring a lack of diligence is between the time one discovers that the Proxy Statement

contained misrepresentations and omissions and the time he sues, any contention of a lack of diligence is without merit.

Unclean hands, a companion defense to in pari delicto, denies affirmative equitable relief to one who is guilty of unlawful or inequitable conduct arising out of the matter with respect to which he seeks relief. The objectionable actions must be intentional. Cf. 30 C.J.S. Equity § 95, at 1021-1022 (1965). Unclean hands is not favored even at common law (30 C.J.S. Equity § 99, at 1048 (1965)) and should be narrower still in the case at bar. A court should adopt unclean hands as a defense only when this result promotes the ends the securities laws seek to achieve. See, e.g., Electronic Specialty Co. v. International Controls Corp., 409 F. 2d 937, 948 n. 7 (2d Cir. 1969) (if management and tender offeror breach securities laws, using unclean hands is cold comfort to the innocent stockholders).

Of course, there has been no breach of applicable law by Prather, only by Avis in issuing defective solicitation materials.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the relief requested herein should be granted and that the Court should (i) declare the vote on Proposals (1), (2), and (3) a nullity and (ii) enjoin the proposed secondary offering of Avis stock.

Respectfully submitted,

RIBICOFF & KOTKIN
Attorneys for Plaintiff-Appellant
799 Main Street
Hartford, Connecticut 06103
(203) 527-9781

Of Counsel:

SHEA GOULD CLIMENKO & CASEY
330 Madison Avenue
New York, New York 10017
(212) 661-3200

2 COPY RECEIVED
6/1/77 197
PAUL, WEISS, RIFKIND, WHARTON & GARRISON
By J. Young

2 COPY RECEIVED
This 6/1/77 day of 19
Whitman & Ransom
Attys. for by R. Marte